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No. 81-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY M. SALONE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Petitioner, Anthony M. Salone, Jr., wishes to respond to some of the points made in the government's Brief in Opposition to the Petition for Writ of Certiorari.

1. The Government side-steps the legal issue raised by this case by asserting that there are only questions of fact

involved. Petitioner reiterates that a reading of the decisions of both the District Court and the Court of Appeals makes it clear that the burden of proving entitlement to further promotions was placed on petitioner. For example, the Court of Appeals notes that the evidence was conflicting[1/] and, indeed, the findings of the District Court themselves were conflicting.[2/] Nevertheless, all doubts were resolved against petitioner. In the cases cited with approval by the Government on page 5 of its brief, on the other hand, it is clear that the burden was on the employer to demonstrate that a person discriminated against would not have

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1/ Pet. App. 12a-14a.

2/ Compare, Pet. App. at 29a, with Pet. App. at 42a.

advanced. Thus, this Court has held that doubts should be resolved against the party responsible for the illegal discrimination. Franks v. Bowman Transportation, Co., 424 U.S. 747, 773, n. 32 (1976).

Therefore, the legal standard applied by the Tenth Circuit is directly in conflict with the standards applied by other courts of appeals and announced by decisions of this Court. Since it is uncontested by the government that the question of entitlement to relief after a finding of discrimination is an important and recurring issue in Title VII cases, this clear conflict between the circuits should be resolved by the Court.

2. With regard to whether the findings of fact of the district were clearly erroneous, the Government is able to refer to only a single record cite

indicating that anyone testified to difficulties petitioner had in his work after 1972 (the date when he was unlawfully denied a promotion). Even that testimony is flatly contradicted by documentary evidence which establishes that petitioner consistently received ratings of 98 to 99 in a performance scale of 100, and was nominated for an outstanding performance rating in 1976. Moreover, as the government itself notes, the district court in its original findings of fact found that petitioner's performance in his job was satisfactory. Given these clear facts, the district court's later finding, in response to the motion to alter or amend the judgment, that petitioner performed unsatisfactorily is clearly an after-thought with no support whatsoever in the record. Indeed, the finding was essentially overruled by

the Court of Appeals when it held that petitioner was entitled to step increases, since such step increases are conditioned upon satisfactory performance in one's job.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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